IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.M.JOSEPH

WEDNESDAY, THE 7TH NOVEMBER 2007 / 16TH KARTHIKA 1929

WP(C).No. 27323 of 2007(C)

PETITIONER:

P.K.DINESHAN, SON OF P.V.KESAVAN,
PUNNACKAL, THURAVOOR, CHERTHALA,
THE LICENCEE OF T.S.NO.10/07-08 OF GROUP NO.IV
OF KUTHIYATHODU RANGE.

BY ADV. SRI.B.GOPAKUMAR

RESPONDENTS:

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1. THE EXCISE COMMISSIONER,
THIRUVANANTHAPURAM.

2. ASSISTANT EXCISE COMMISSIONER,
ALAPPUZHA.

3. THE CIRCLE INSPECTOR OF EXCISE,
CHERTHALA.

4. V.V.RAVEENDRANATH,
ASSISTANT EXCISE COMMISSIONER,
ALAPPUZHA.

BY GOVERNMENT PLEADER (SHRI P.K. RAVIKRISHNAN)

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 23.10.2007, THE COURT ON 7.11.2007 DELIVERED THE FOLLOWING:

APPENDIX W.P.(C). NO. 27323 OF 2007 C

PETITIONER'S EXHIBITS:

EXT.P1 TRUE COPY OF EXTRACT OF THE LICENCE REGISTER 1999-2000.

EXT.P2 TRUE EXTRACT OF THE LICENCE REGISTER 2001 - 2002.

EXT.P3 TRUE COPY OF THE NOTICE DATED 1.4.2007 OF THE 2ND RESPONDENT.

EXT.P4 TRUE COPY OF THE APPLICATION ON RECEIPT OF EXT.P3 ON 13.4.2007.

EXT.P5 TRUE COPY OF THE JUDGMENT DATED 1.3.2006 IN W.P.(C). NO. 6030/2006(P) BEFORE THIS COURT.

EXT.P5(A) TRUE COPY OF ORDER OF 1ST RESPONDENT DATED 14.3.2006 PURSUANT TO EXT.P5.

EXT.P6 TRUE COPY OF THE APPEAL DATED 11.5.2007 BEFORE THE 1ST RESPONDENT.

EXT.P6(A) ORDER NO.A1-624/05 DATED 7.5.2007 ISSUED BY RESPONDENT NO.2 WHICH IS CHALLENGED IN EXT.P6.

EXT.P7 TRUE COPY OF JUDGMENT IN W.P.(C). NO.15857/07(M) DATED 24.5.2007 IN THIS HONOURABLE COURT.

EXT.P8 TRUE COPY OF ORDER NO.XA7-10817/2007 DATED 14.6.2007 ISSUED BY EXCISE COMMISSIONER, TVM. (1ST RESPONDENT).

EXT.P9 TRUE COPY OF JUDGMENT DATED 27.76.2007 BY THE HONOURABLE HIGH COURT QUASHING EXT.P8 RENDERED IN W.P.(C). NO. 19029/2007 M.

EXT.P10 TRUE COPY OF ORDER NO.XA7/10817/07 DATED 10.8.2007 ISSUED BY THE 1ST RESPONDENT PURSUANT TO EXT.P9.

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EXT.P11 TRUE COPY OF ORDER DATED 29.9.2004 IN W.P.(C). NO. 22297/2004-D OF THIS HONOURABLE COURT.

EXT.P12 TRUE COPY OF GOVT. ORDSER REFERRED TO IN EXT.P11.

RESPONDENTS' EXHIBITS: NIL.

// TRUE COPY//

PS TO JUDGE

K. M. JOSEPH, J.

W.P.C. NO. 27323 OF 2007 C

Dated this the 7th November, 2007

JUDGMENT

Petitioner purchased the privilege of running a toddy shop, known as Polad shop of Group No.IV of Kuthiyathode Range. It was located in Building No.A-1/347 in Survey Nos.415/5-2, 415/4-3, and 415/3/3-14. This is sought to be proved by Exts.P1 & P2 which are Registers maintained in the office of the second respondent. They related to the years 1999 - 2000 as well as 2001-2002. Ext.P3 is a notice dated 14.7.2007 issued by the Assistant Excise Commissioner informing the petitioner that he has secured licence for the Polad shop for the year 2007 - 2008. It is the further case of the petitioner that during the previous years, the then licensee had shifted the Polad shop to his own convenient premises. Petitioner submitted Ext.P4 application on receipt of Ext.P3, to grant him permission to conduct the shop in the premises in Exts.P1 and P2. The applications came to be

rejected on the ground that Sreekumara Vilasom Temple, Aroor is situated within the prohibited distance of the said location. Petitioner preferred an Appeal. He has also produced Ext4s.P5 and P5(a) which are the decision of this Court and the order passed in identical case issued by the first respondent. Ext.P6(a) is the order which is challenged in Ext.P6Appeal. This Court directed by Ext.P7 Judgment, the disposal of Ext.P6 Appeal. Ext.P8 evidences the appellate order rejecting the Appeal. This came to be quashed by Ext.P9 Judgment of this Court. This Court noted in Ext.P9 that there was no specific consideration of the claim of the petitioner based on the second proviso to Rule 7 (2) of the Kerala Abkari Shops Disposal Rules, 2002. Thereafter, the first respondent issued Ext.P10. In Ext.P10, reference is made to the Report which the petitioner has alleged is a biased Report by the fourth respondent behind the back of the petitioner. It is the case of petitioner that the fourth

respondent who is impleaded in his personal capacity is siding with the contractor in the previous year who competed with the petitioner and lost. It is stated that the Government has passed Ext.P12 on the basis of Ext.P11 order without any such Report. Petitioner seeks to quash Exts.P6(a) and P10 and he seeks a direction to respondents 1 & 2 to permit him to locate the Polad shop in the premises mentioned in Exts.P1 & P2 as sought for in Ext.P4.

2. A Counter Affidavit has been filed by the first respondent, inter alia, stating as follows:

The toddy shop No.10 of Polad was not licensed and functioned in the premises No.AP1/347 during the consecutive five years from 2002 - 2003 to 2006 - 2007. There is a lacuna of five years in the continuity of functioning of the shop in the above site. It is the case of the first respondent that accepting the case of the petitioner would result in violation of Rule 7(2).

It is clear that there are unobjectionable places where the shop can be licensed and functioned, as the petitioner himself admits that the shop in question had been functioning in some other places within the scheduled limits of the shop during five years from 2002 - 2003 to 2006 - 2007. It is stated that the provision claimed can be available if the shop was continuously licensed and functioning in the same building during the previous years availing the exemption given to them by the Notifications and Government Orders in this behalf. It is stated that the petitioner cannot rely on Exts.P5 and P5(a). It is stated that the functioning of the shop was temporarily shifted for repair works of the building. Due to financial constraints of the licensee, the repair work was delayed. It was in such circumstances that Ext.P5 order was issued allowing the licensee to shift to the original premises where the shop was previously located, as the shifting was made for carrying of the repair work.

3. I heard Shri B. Gopakumar, learned counsel appearing for the petitioner and the learned Government Pleader.

4. Learned counsel for petitioner submits that the petitioner could not locate an unobjectionable site where the toddy shop could function. It is in such circumstances that the petitioner has made Ext.P4 request to locate in the very same place where the Polad toddy shop was located in the year 1999-2000 and 2001 - 2002 as evident from Exts.P1 and P2. He would submit that the Polad toddy shop was so located in 1999-2000 and 2001 - 2002 which are previous years to the year 2007 - 2008 and, therefore, there is no reason to deny the petitioner the benefit of the second proviso to Rule 7(2) of the Rules. He would point out that it is only on account of the malafides of the fourth respondent who wanted to favour other contractor that the petitioner is at the receiving end of such a treatment as is meted out in the impugned orders.

5. The short question which arises turns round the

interpretation to be placed on the second proviso to Rule 7(2). It is extracted hereunder:

> *"Provided further that the restrictions regarding distance from an Educational Institution, Temple, Church, Mosque, Burial ground and Scheduled Caste/Scheduled Tribes Colonies for locating toddy shops shall not apply to those shops which remained unlicensed for want of unobjectionable site and which are for that reason sought to be located at the same place where they were licensed in previous years availing of the exemptions given to them by notifications/Government Orders in this regard."*

Of course, there is no dispute that a temple is situated within the prohibited distance of the location where the toddy shop was located in the year 1999-2000 and 2001-2002. The only question is whether, having regard to the fact that from 2002 onwards the licensee had shifted the shop from the said location to another location and the shop has not been located at the

place where it was located from 1999 - 2000 and 2001 - 2002, the petitioner is to be denied the said benefit. In other words, the question to be decided is what is the meaning of the words "previous years" referred to in the proviso. If the words "previous years" are to be given the meaning the years immediately preceding the year in which the right is claimed under the said proviso, then certainly, the petitioner must fail. This is for the reason that the shop was not located in the place where it was located as evident in Exts.P1 and P2, and that the licensee had shifted from there from the year 2002 onwards. Then, counsel for petitioner submits that the petitioner could not find any unobjectionable site and the benefit of the proviso is available in such circumstances, as the location indicated in Ext.P4 request of the petitioner was the site at which the toddy shop functioned in 1999 - 2000 and 2001 - 2002 which are also previous years to the year 2007 - 2008 to which the dispute relates. He would point out that the proviso does not contain the words "immediately" before the words "previous years" and in

such circumstances, having regard to the object of the proviso and having regard to the fact that the petitioner was not able to find any other unobjectionable site, there is no warrant in not allowing the petitioner to conduct the shop at the place where it was located as evident from Exts.P1 and P2.

6. Though at the first blush, having regard to the fact that there is reference to the words "previous years", it would appear that there is merit in the argument of the petitioner as it could be said that it is not limited to the immediately previous year and if it is located at the site in any of the previous years, a person could avail the benefit of the proviso, however, it is my considered view that the said interpretation may not be apposite. It is not in dispute that from 2002 onwards till 2006 - 2007 the shop has not functioned at the site where it was located vide Exts.P1 and P2. Thus, for five years, the licensees had shifted from out of the place where it was located during 1999 - 2000 as well as 2001 - 2002. There is clearly a break from the position obtaining in 2002 in the subsequent years. I would think,

therefore, that in such circumstances, even though it may be true that the petitioner has not found any unobjectionable site, he cannot take shelter under the words "previous years" when the licensees have, from the years 2001 - 2002 onwards, found out another place, where the shop was being located. I would think that to rely on Exts.P1 and P2 which relate to the years 1999 - 2000 and 2001-2002 would not be in keeping with the object of the Rule in question. I see no merit in the Writ Petition and accordingly it is dismissed.

K. M. JOSEPH, JUDGE

kbk.